IN THE COURT OF APPEALS OF IOWA

No. 0-347 / 09-0936
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TAMMY SUE BRANDT,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Marsha Beckelman, Judge.

Finance office employee appeals conviction for theft in the first degree. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout and James Kivi, Assistant Attorneys General, and Harold Denton, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

EISENHAUER, J.

After an internal audit discovered discrepancies, Tammy Brandt was charged and convicted of first-degree theft. Brandt appeals, arguing: (1) there is insufficient evidence to support her conviction; (2) the trial court erroneously admitted hearsay and vehicle make/model evidence; and (3) she received ineffective assistance of counsel. We affirm Brandt's conviction and preserve her ineffective assistance claims.

I. Insufficient Evidence.

Brandt argues the State's evidence is insufficient to support her conviction for first-degree theft.[1] We review her claim for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). The jury's verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. *Fenske v. State*, 592 N.W.2d 333, 343 (Iowa 1999). "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.* "We review the facts in the light most favorable to the State." *Id.*

In order to be convicted of theft, the State had to prove: (A) Brandt took possession or control of money belonging to Mercy Medical Center; (B) Brandt did so with the intent to deprive Mercy Medical Center of the money; and (C) the money, at the time of the taking, belonged to Mercy Medical Center. *See* Iowa Code § 714.1(1) (2007). The theft of property exceeding $10,000 is first-degree theft. *See id.* § 714.2(1).

[1] We find no merit in the State's argument Brandt's motion for acquittal failed to preserve error.

The evidence in the light most favorable to the State shows the following facts. Mercy Medical Center (Mercy) was founded and is still sponsored by the Sisters of Mercy. A separate organization, Mercy Foundation (Foundation), accepts money to help the medical center.

Brandt started working at Mercy in 1979 and held a number of positions: "administrative secretary, staff accountant, budget director, accounting assistant, [and] executive assistant" to the director of finance. Brandt started at a salary of $5.12/hour and was paid $23.17/hour when her employment ended in January 2008. Laurie Aquino, a certified public accountant, was hired by Mercy in March 2006. Due to the Foundation changing presidents, Aquino started an internal audit of the Foundation in July 2007. It is standard procedure to conduct an audit after a leadership change and Aquino's audit was not initiated due any suspicion of wrongdoing. The audit's scope was to look at the Foundation's basic donor policies and procedures.

Foundation employees track donations using software called "Raiser's Edge." The software lists the name of the donor, the amount of the donation, and the type of donation—cash, check, or credit. On a weekly basis, after Foundation donations were recorded in Raiser's Edge, the donations were given to Brandt. The Foundation typically gave the donations to Brandt on Fridays or on the last day of the month. Only Brandt picked up the Foundation donations. If Brandt was not going to be in the office on Friday, she notified the Foundation she would stop by on Thursday to pick up the donations. Brandt deposited the donations into the Foundation's bank account.

While the Foundation accepted credit card donations, it was not equipped to process credit transactions. Brandt took the Foundation's credit card slips to the Mercy cashiers to process and to have the cashiers issue a check for deposit in the Foundation's bank trust account. The Foundation and Mercy established an exchange account for the Foundation/Mercy transactions. The account was expected to have a zero balance. Accordingly, Brandt was solely responsible for obtaining and depositing the donations and reimbursement checks.

Initially, Aquino discovered a $24,000 discrepancy for five months in FY07 and this research was given to Brandt to fix. Aquino waited for an explanation for the cause of the discrepancy before any further investigation. Eventually, Brandt responded by giving Aquino "another spreadsheet, but it didn't make any sense. It just seemed to be a lot of plugged figures." Brandt's response "didn't satisfy what we were asking." Aquino kept pushing for more information and described her conversations with Brandt:

> [W]hen I first discovered these discrepancies that I had gone to [Brandt] and asked her about . . . why she was requesting the authorization for payment because she was actually filling them out and then signing off on the forms as well. No manager was signing off on the forms. And when I asked her for the reason why she was writing the amounts, she had originally told me that . . . the president before the current president had wanted us to . . . deposit the cash into the [Mercy] business office. And I said, "Okay. Do you have your receipt, your miscellaneous receipts," because there is another form when you deposit with the cashier's office, and it's called a miscellaneous receipts form . . . . And most people keep, especially . . . cash, they would keep their copies.
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> Well, in this case [Brandt] told me—she's like, "I'll have to go look," and then a little bit later, she came back and said, "Wait, no that—that didn't start until April." And then I asked her, "Well, do you have your miscellaneous receipts from April to date?" and she said, "I'll have to look for you."

> And then at that point, [Brandt] really avoided me, and I would kind of ask her and she said, "I'm really busy. I'm still looking."

Aquino developed concerns with "segregation of duty issues" because "one person was able to do too many things. The same individual [Brandt] was able to . . . prepare the deposit, record the deposit in the general ledger, and then also brought it to the bank."

Two Mercy cashiers testified Brandt would call on a regular basis, once or twice a month. Brandt would tell them she was bringing down a large check to cash, from $500 to $2000 and always asked for $100 bills. Brandt had to call ahead because the cashiers did not regularly have the currency to cash a check that size. Brandt stated the cash was for the Sisters to give to the homeless or for a vacation trip for the Sisters. The cashiers did not have access to either donation checks or Foundation checks at any point unless someone brought the check to them.

Aquino eventually constructed a detailed, multi-page spreadsheet showing over $200,000 in diverted funds from Mercy for fiscal year 1996 to partial fiscal year 2008 (through December 21, 2007).[2] Aquino opined the Mercy cashiers could not divert this money.

Aquino explained during fiscal year 2008, no funds were diverted after October 5, 2007. Significantly, in early October 2007, the internal audit's observation of discrepancies and recommendations for a new segregation in money-handling duties was released. Mercy responded by changing "who

[2] Aquino explained the Foundation's records prior to fiscal year 1996 did not differentiate whether the donation was a check or cash, so she did not analyze older records.

handled the deposit, and they took [Brandt] out of that process." As of October 31, 2007, Foundation staff prepared the weekly Foundation deposit instead of Brandt.

On December 19, 2007, Foundation staff prepared the weekly deposit under the new procedures. However, Aquino noted in a separate line of her spreadsheet that Brandt made a cash deposit on December 19, 2007, of $1177, which resulted in the exchange account for the Foundation/Mercy transactions returning to a zero balance. Brandt's deposit was made "well after" Aquino's investigation and recommendations, and after Brandt was removed from the Foundation deposit process.

In January 2008, Mercy hired Kerry Bolt, a former IRS agent with twenty years of experience conducting criminal fraud investigations. Bolt is a certified fraud examiner and does forensic accounting through his business, KAB Financial Investigations. Bolt was hired to augment the internal audit. Bolt explained the Foundation's donation process and the irregularities:

> The procedure was that the credit card and the cash went to the finance office and to reimburse the Foundation, the finance office would write a check for the same amount so that the Foundation would deposit only checks into their account.
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> The irregularity was found in that the reimbursement check from Mercy Medical Center to the Foundation in some instances was found to be larger than the amount of the combined cash and credit cards. That was an irregularity that clearly shouldn't be, that the system was set up that the two should match each other each week.
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> . . . .
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> The interview of the cashiers determined that there had not been any cash deposits from Tammy Brandt into the finance office to the cashiers with one exception and that exception occurred . . . after the audit . . . . That deposit was . . . $1177 and . . . it brought the exchange account, which is the account that the credit card and

> cash was supposed to be deposited into and the check came out of that, brought that account into balance. It had not been in balance. It had not been reconciled previously to that.
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> This created another area that was fairly clear that the currency that the Foundation had been receiving was not being deposited into the Mercy Medical Center exchange account as it was supposed to be done.

Based upon his review of the internal audit and his own investigation, Bolt opined Brandt took the cash that had been donated to the Foundation. Bolt's conclusion was "based on two or three different points":

> First of all, the currency was never deposited in the Foundation [bank] account because it was not allowed to. The account was not set up to accept cash so that wasn't an option.
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> When Tammy Brandt was interviewed in early January 2008 . . . regarding the irregularities, she stated that she deposited the cash and the checks into the Foundation account when asked what was done with the money. She could not have made that statement without having the knowledge that the account would not take cash. If you'd ever tried to deposit currency into that account, it would have come back from the bank because they wouldn't accept it, so that tells me she never tried to deposit the currency because she still thought it would accept cash.
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> Subsequently, there is evidence that she called the bank to find out if the account, in fact, would take cash and was informed it would not. So three weeks later in another meeting . . . she now changed . . . that she did not deposit the cash into the Foundation account; that it was taken down to the cashiers and deposited there.

Bolt also stated Brandt would bring down Foundation donor checks to deposit into the Mercy finance account and the cashiers gave Brandt cash in $100 bills.

> On several occasions, Ms. Brandt gave an excuse as to why she needed to cash this check. Two of them come to mind. One was the Sisters of Mercy were going on vacation, and they needed the cash, and the other being that the sisters were handing out cash to homeless people. This was during the December time frame.

> Of course, both of those explanations were followed up with the appropriate people, and they were denied. That did not happen.

Brandt and her husband had numerous personal loans with Collins Credit Union. Bolt analyzed these personal loans and discovered "significant amounts of the loan payments were being made in currency." Over a five-year period, $60,000 in *cash* payments reduced the loan balances. Bolt concluded payments were made with $100 bills:

> On several occasions going through those records—the payment of the loan was $550—there would be a $50 cash return ticket to either Tammy Brandt or her husband which indicates to me the payment amount was $600, and by deduction, the 600 would have to be in $100 bills for them to have to make change of $50 back. So based on that and based on my experience in other investigations that it's clear that the cash, at least on those instances, was paid in $100 bills.

Next, Bolt examined three years of Brandt and her husband's personal bank accounts to "determine if there is a possibility of significant cash being withdrawn from their personal accounts that could account for the cash payments on the personal loans." Bolt found ATM and cash withdrawals of $6500 for three years. The average monthly withdrawal was $160 while the average Brandt monthly personal loan payment was $550.

Bolt agreed with Aquino's determination "over $200,000" was taken over a period of years. Bolt explained the Foundation did not lose money, but Mercy did due to the reimbursement checks Mercy issued: "The Foundation was always made whole on the total amount of donations that were made. The reimbursement check covered even the misappropriated checks and the cash

that had been misappropriated." Bolt opined no one else but Brandt could have diverted the funds.

Brandt admits Aquino's spreadsheet shows "exchange account checks were written for about $210,000 more than the amount of the cash and credit card deposits." In contending the evidence is insubstantial, Brandt points to the fact one cashier originally stated Brandt brought down yellow Foundation checks, not donor checks, to exchange for the 100's while Bolt did not conclude the diversion of funds involved yellow Foundation checks. However, the testimony also established the cashiers handled up to 500 checks every day and the second cashier could not recall the type of check Brandt exchanged for cash. The credibility of witnesses is for the factfinder to decide except for those rare circumstances where the testimony is absurd, impossible, or self-contradictory. *State v. Kostman,* 585 N.W.2d 209, 211 (Iowa 1998). A reasonable juror could conclude the cashier handled so many checks each day that she was mistaken in recalling the type of check Brandt exchanged for cash.

Brandt also points out there are no receipts showing the cashiers gave Brandt cash. However, the cashier did not issue a receipt in reliance upon instructions from supervisors.

We conclude the evidence detailed above shows substantial evidence supports the jury's verdict and we affirm the verdict. *See State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000).

II. Evidentiary Rulings.

Brandt argues the court erred in admitting prejudicial hearsay evidence and seeks a new trial. "Hearsay . . . must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision." *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). We review Brandt's hearsay challenges for errors at law. *See id*.

First, Brandt alleges error in the court allowing Aquino to testify, over objection, that the Foundation's bank account was not set up to receive cash. Assuming without deciding this evidence constitutes hearsay,[3] we find no error. "[N]otwithstanding the presumption of prejudice from the admission of such evidence, erroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record." *Id.; see State v. McGuire*, 572 N.W.2d 545, 547 (Iowa 1997) (noting a "court will not find prejudice if substantially the same evidence has come into the record without objection"). Bolt testified twice, without objection, the Foundation's bank account did not accept cash:

> Similarly, the Foundation bank account at US Bank at that time was not—did not allow cash deposits into that account, so cash had to be given to the finance office also to be deposited.
> . . . .
> First of all, the currency was never deposited in the Foundation account because it was not allowed to. The account was not set up to accept cash so that wasn't an option.

[3] "[A] statement is not hearsay if it is not offered to prove the truth of the matter asserted." *Newell*, 710 N.W.2d at 18.

Accordingly, Aquino's statements are not prejudicial because substantially the same evidence is properly in the record through Bolt's testimony.

Second, Brandt claims error in admitting hearsay testimony from cashier Garland:

> State: Did you ever ask, in the course of your duties, whether or not something in writing was necessary in order to get these $100 bills. A. No, I did not.
> State: Did anyone ever tell you in the course of your duties that it was okay for her [Brandt] to do this by telephone or in person? Defense Counsel: Your Honor, I object. It calls for hearsay.
> State: Explains her future conduct.
> Court: I'm going to overrule it. She can answer.
> . . .
> A. When I first started at Mercy, I had been told by my supervisors that certain people such as administration or the Sisters of Mercy or finance, if they asked me to do something, I should do it.

"When an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive conduct, it is not regarded as hearsay." *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990).[4] We conclude Garland's testimony was not introduced for the truth of the matter asserted, but rather to explain Garland's future conduct in ordering $100 bills for Brandt as requested.

Third, Brandt claims error in the court reversing its pretrial ruling on Brandt's motion in limine regarding the make and model of the vehicles Brandt purchased and financed through credit union loans. We review "standard claims

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[4] Brandt's claim the court should have given a limiting instruction to the jury regarding the hearsay testimony is without merit. Brandt did not request a limiting instruction and we will not consider the matter for the first time on appeal. *State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999).

of error in admission of evidence for an abuse of discretion." *State v. Stone*, 764 N.W.2d 545, 548 (Iowa 2009).

The court addressed Brandt's motion in limine prior to trial. The court noted the parties agreed the credit union records about loan payments would be admitted without foundation and the State agreed to "not introduce loan papers that might disclose the make and model" of the vehicles underlying the loans and agreed to not mention "the name or make or model of the vehicle" during the jury selection process.

However, during his opening statement, defense counsel claimed:

> What I would like to say just in closing is that evidence will show the State is going to somehow say, well, if we have this alleged theft and we're going to allege Tammy Brandt had some level of involvement, [the prosecutor] has said hundreds of dollars per week or thousands of dollars he has stated, my golly then, let's check out Tammy and Barry Brandt as to where those funds or money went. And the evidence will show that there isn't going to be any evidence about cars or boats or off road vehicles or paying off mortgages or things that you may seem possibly the evidence could show would be related to this level of funds.

After opening statements, the State argued and the district court agreed, defense counsel opened the door for the State to inquire into the make and model of the vehicles Brandt and her husband purchased. The court ruled:

> Mr. Brown, as we discussed in chambers, the statement that was made during your opening . . . in fact, your statement went to the issue of there is no indicia here that your client was spending money on expensive cars period, and I think the door got opened during your opening.

"Under the Doctrine of Invited Error, it is elementary a litigant cannot complain of error which he has invited . . . ." *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa Ct. App. 1989). Accordingly, Brandt cannot

complain about the admission of this evidence on appeal when her defense counsel's opening statement claimed there "isn't going to be any evidence about cars . . . related to this level of funds." *See State v. Hall*, 235 N.W.2d 702, 728 (Iowa 1975) (stating under the "doctrine of invited error," the State "need not sit mute and let such a self-serving statement [in counsel's argument] go unchallenged"). We find no abuse of discretion.

III. Ineffective Assistance of Counsel.

Brandt's final argument is she received ineffective assistance of counsel by: (1) counsel's failure to make several objections to allegedly improper testimony by expert witness Bolt and failure to seek a limiting instruction regarding the use of Bolt's testimony; and (2) counsel's failure to raise a confrontation clause objection to Aquino's testimony regarding the bank employee's statement the Foundation's account did not allow cash deposits.

In order to prevail on her claims of ineffective assistance of counsel, Brandt must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id*. at 392. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow an adequate record of the claim to be developed "and the

attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

This is not the "rare case" which allows us to decide Brandt's ineffective assistance claims on direct appeal without an evidentiary hearing. *See State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). We preserve her claims for possible postconviction relief proceedings.

AFFIRMED.